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RES JUDICATA. — The distrust of the layman for the technicalities of the law will be increased and a new significance will be given to the ancient opinion that "estoppels are odious" by a recent decision of the United States Supreme Court. In 1896 a Kentucky circuit court decided that the Hewitt law constituted an irrevocable contract exempting the defendant bank from certain taxes. In 1898, in a suit between the same parties, a federal court enjoined the attempt to collect the tax for future years, holding the judgment of 1896 conclusive evidence that an irrevocable contract existed. Subsequently the Kentucky Court of Appeals, in reversing the judgment of 1896, decided that no irrevocable contract existed, and the case was remanded. In the new trial the bank introduced the decree of 1898 as rendering the irrevocability of the contract *res judicata*. Upon error to the Supreme Court of the United States this defense was sustained by a majority of one. *Deposit Bank* v. *Board of Councilmen*, 24 Sup. Ct. Rep. 154. A well-reasoned decision of a federal circuit court,[1] directly *contra*, which apparently escaped the notice of the court, must now be regarded as overruled. In consequence of this decision, the plaintiff in the new trial is thrown out of court by an indirect effect of the very judgment which it has just succeeded in reversing.

The effect of an estoppel whether by judgment, by deed, or *in pais*, is merely to preclude the party estopped from disputing the existence of certain facts or the correctness of certain propositions of law.[2] Any contention that the estoppel *per se* actually establishes the objective existence of the facts is obviously erroneous, for it is freely conceded that the parties

[1] French *v.* Edwards, 4 Sawy. 125.

[2] Co. Litt. 352a.

estopped by a judgment might have avoided the estoppel by introducing other evidence,[3] and estoppels by deed and *in pais* are admittedly most valuable when they prevent a party from setting up actual facts.

This being the nature of estoppel, there are two possible views of the effect of a judgment based on an estoppel. The first is that it merely affirms the existence of the estoppel and enforces it as a bar against any attempt to set up the facts. But if the decree of 1898 merely affirmed that the existence of the judgment of 1896 existed as an estoppel and precluded the plaintiff from asserting that the contract was revocable, it would be clearly competent in the new trial for the plaintiff, while conceding the correctness of the decree which decided that an estoppel then existed, to show that since 1898 the estoppel had been removed by the reversal of the judgment.[4] The principal case can then be sustained only on a second theory, namely, that in dealing with a former judgment a court regards it not merely as preventing the questioning of certain facts, but as conclusive evidence of their actual existence; that the federal decree of 1898 not only asserted the existence and conclusiveness of the judgment of 1896 as an estoppel, but asserted further the correctness of that judgment as a judgment on the merits, so that the decree of 1898 was an independent adjudication that the Hewitt law actually constituted an irrevocable contract. This view is fictitious, for to affirm that a judgment based on an estoppel establishes the facts, but only between the parties, is in effect to admit that it does not establish the facts at all. Furthermore, as is frequently the case when fictions are consistently adhered to, it leads to consequences undesirable from a practical standpoint, as is illustrated by the decision of the principal case.

Liability of National Banks Acquiring Shares in a Partnership. — National banks, although given great freedom as to the kinds of security that they may take for already existing loans, may nevertheless be subjected to some restrictions. A national bank in a recent case accepted as security nine of the forty transferable shares of a partnership. In the course of realizing on this security the bank accepted a transfer of the shares and participated in the management of the partnership. Debts were contracted and the partnership became insolvent. It was attempted to hold the bank liable for such debts as a partner, thus subjecting it to the burden of the insolvency of other partners. The court held, however, that the bank, though able to own the shares, had no capacity to become a partner. The bank, however, was held to have become a part owner of the partnership property, such ownership being in its nature several, and was held liable for its proportional share of the debts in question but no more. *Merchants' National Bank* v. *Wehrmann*, 68 N. E. Rep. 1004 (Oh.).

If the court is right in saying that the bank had capacity to hold and did hold title to the shares, it would follow that the bank became in all respects a partner, for from the nature of the shares that is a necessary consequence of their ownership. Although a corporation is generally held to lack capacity to form a partnership,[1] it may become a partner if the char-

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[3] *Cf.* Chicago Theological Seminary *v.* People, 189 Ill. 439.

[4] *Cf. In re* Anglo-French, etc., Society, 14 Ch. D. 533.

[1] Aurora State Bank *v.* Oliver, 62 Mo. App. 390; Whittenton Mills *v.* Upton, 10 Gray (Mass.) 582.